BAN LEUNG CREDIT (JINJANG) SDN BHD & ANOR A

v.

MATHEW ABRAHAM & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: S5-23-137-1987]
5 APRIL 2007

TORT: *Misrepresentation - Negligent misrepresentation - Purchaser enters into sale and purchase agreement with fraudulent party - Whether vendor's lawyer's representations induced purchaser to enter into sale and purchase agreement - Causation - Whether purchaser would not have entered into sale and purchase agreement if not for vendor's lawyer's assurance - Whether any cause of action against vendor's lawyer* C

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TORT: *Negligence - Duty of care - Whether registered owner of property owes duty of care not to part with title deed of property to fraudster - Purchaser enters into sale and purchase agreement with fraudulent party - Claim by purchaser against registered owner of property - Whether registered owner negligent in parting with title deed of property - Foreseeability - Whether registered owner could reasonably foresee the fraudulent scheme - Foolishness and carelessness of registered owner in parting with title deed to fraudster not an act of negligence* E

The fourth defendant company ("Yoon Hoe") were the registered proprietor of a land in Batu Pahat ("the land"). The directors of Yoon Hoe had been introduced to a person named Chung Kung Ying ("Chung") who claimed to represent a company which was interested to buy shares in Yoon Hoe, whose sole asset was the land. In pursuance of this, the directors of Yoon Hoe handed over the title deed to the land to Chung to be shown to the directors of the proposed buyer and thereafter to be returned to Yoon Hoe. However, the title deed was never returned by Chung. The directors of Yoon Hoe therefore entered a caveat against the land to prevent any attempt by Chung or anyone else from disposing of the land fraudulently. F G

Chung had subsequently prepared a false return for Yoon Hoe to make it appear that all existing directors of Yoon Hoe had resigned and that Chung and one Ilham had been appointed directors. Chung them approached the plaintiffs to sell the land to the plaintiffs. Chung purported to appoint the second defendant (A&G) to represent Yoon Hoe in the transaction. Chung had convinced A&G that he was a director of Yoon Hoe and that he had the authority to act in the transaction involving the land. The plaintiffs were represented by the first defendant ("Abraham"). A&G then wrote to Abraham saying that H I

A they were acting for Yoon Hoe and that they had in their possession the title deed and the memorandum of transfer together with the stamping proforma duly executed ("the documents"), which they would release to Abraham for further action upon receipt of the full purchase price of RM990,000. On 29 November 1984 A&G received from B Abraham payment of the purchase price and thereafter delivered to Abraham the documents. The plaintiffs were however unable to get themselves registered as the proprietors of the land because they were unable to remove three caveats that had been entered against the land. So they brought this action to claim damages. The action proceeded C only against the second defendants ("A&G") and Yoon Hoe. The plaintiffs found their action against A&G on the allegation that A&G "advised or induced" the plaintiffs to enter into the sale and purchase agreement. It was also claimed that A&G had breached their duty to exercise all due care skill and diligence as solicitors to protect the interest of the plaintiffs in the sale transaction. The plaintiffs also claimed D that Yoon Hoe owed them a duty of care on the grounds that it was reasonably foreseeable that Chung could use the Original Issue Document of Title for some unauthorised purpose.

Held (dismissing the plaintiffs' claim against A&G (second E **defendant) and Yoon Hoe (fourth defendant) with costs):**

(1) For the plaintiffs to succeed in their claim that it was A&G's representations that induced them to enter into the sale and purchase agreement, there must be evidence that, in spite of having the services of Abraham, they would not have entered into the sale and F purchase agreement had they not derived assurance from A&G's letters that the sale was in fact by Yoon Hoe. But there was no such evidence. (para 34)

(2) The plaintiffs had decided to enter into the sale and purchase G agreement even before the date of the first of A&G's three letters, and would have entered into the sale and purchase agreement in any event. A&G's letters did not induce the plaintiffs to enter into the sale and purchase agreement. (para 36)

(3) Yoon Hoe did not owe a duty of care to the plaintiffs not to part H with the title deed to Chung. The use to which the title deed was put after Chung obtained possession of it to further Chung's fraudulent design could not be said to be reasonably foreseeable when the Yoon Hoe directors let Chung have possession of it. They could not reasonably have foreseen that Chung would retain I the title deed to carry out his fraudulent scheme. They may have

been foolish and careless in leaving the title deed with Chung instead of merely showing it or leaving a photocopy of it, but that made no difference to the question of the reasonable foreseeability of the subsequent use of the title deed. Therefore, the plaintiffs' claim in negligence against Yoon Hoe failed. (para 38)

Legislation referred to:
Companies Act 1965, ss. 123(4), 141(6)

For the plaintiffs - Mah Weng Kwai (Deborah Kaur with him); M/s Mah Weng Kwai & Assoc
For the 2nd defendant - Zainal Azim (Robin Lim, Tunku Farik Ismail and Liza Hanim with him); M/s Azim, Tunku Farik & Wong
For the 4th defendant - Navamani Arumugam; M/s Navamani Arumugam
Subsequently: Kenneth Goh (Nor Amimi & Thiru Mangai Krishnan with him); M/s Othman Hashim & Co

Reported by Amutha Suppayah

JUDGMENT

Abdul Aziz Mohamad J:

[1] The fourth defendant company ("Yoon Hoe") were the registered proprietor of a land in Batu Pahat ("the land"). The plaintiff's claim that they entered into an agreement with Yoon Hoe to purchase the land. The plaintiffs were unable to get themselves registered as proprietors of the land. So they brought this action to claim damages. The action proceeded only against the second defendants ("A&G") and Yoon Hoe. The second defendants are a firm of advocates and solicitors. The plaintiffs contend that A&G acted for Yoon Hoe in the sale of the land.

[2] The plaintiffs were unable to get themselves registered as the proprietors of the land because they were unable to remove three caveats that had been entered against the land. Their application for the removal of the caveats had been dismissed by Mahadev Shankar J (as he then was), who, in his grounds of judgment (P32), described the purported sale of the land to the plaintiffs as a "brazen swindle" and one Chung Kung Ying @ Chung Cheng Wen ("Chung") as "the villain of the piece". He was the person who introduced the plaintiffs to the land.

[3] Yoon Hoe was incorporated on 29 September 1978. Four directors were appointed on that date, namely, Koh Chin Kwang ("CK Koh"), Nyeo Tong ("Nyeo"), Lim Yok Kee ("Lim") and Koh Nai Ting ("NT Koh"). Three of them gave evidence as witnesses for Yoon Hoe, namely, Nyeo, Lim and KC Koh. NT Koh was bedridden and

A unable to give evidence. From the evidence of the three, I am satisfied that Chung was a stranger to the four directors until 17 April 1984, that he was never a director or shareholder of Yoon Hoe and that he was never authorized by Yoon Hoe or the four directors to sell the land. Lim and Nyeo gave evidence as to how the title deed, that is the issue B document of title, to the land got into the hands of Chung. Although there are inconsistencies in their evidence, I am satisfied that it was by trickery that Chung obtained possession of the title deed. There was a man named Teng Pek who had been connected with Yoon Hoe. One day he approached the four directors, holding himself out as a C representative of a big company having business in Malaysia, Singapore, Taiwan and Hong Kong and told them that the company was interested to buy the shares in Yoon Hoe, whose sole asset was the land, but the directors, who would be coming to Kuala Lumpur for a meeting, would first like to see the title deed to the land before deciding on the purchase.

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[4] On 17 April 1984 the four directors drove up to Kuala Lumpur from Batu Pahat and met Teng Pek and Chung in Kampung Baru, when Teng Pek introduced Chung to them. From Kampung Baru three of the four directors went to an office somewhere to meet the so-called E directors and it was there that N.T. Koh (who did not give evidence) gave the title deed to Chung. According to Nyeo, they were supposed to go back to the office later in the day to get back the title deed but when they went back the office was closed. According to Lim, they met Chung on 18 April 1984 at the hotel where they were staying. They F insisted on getting the title deed back because they did not believe in the genuineness of the whole thing but Chung said that the title deed was still with the directors. Chung asked them to return to Batu Pahat and said he would go to Batu Pahat the next day and return the title deed and pay the price for the shares, but they insisted on getting the title deed back there and then. All they got ultimately was a handwritten G acknowledgment dated 18 May 1984 signed by Chung and Teng Pek, ostensibly as directors of New Trading Co. Sdn. Bhd., stating that that company had received the title deed from the four directors, who were named. I proceed on the supposition that the company did not exist. That acknowledgment is in evidence (P71). There is also in evidence a H letter of undertaking dated 23 June 1984, more than a month after the aforesaid acknowledgment, signed by Chung and Teng Pek ostensibly on behalf of New Trading and addressed to Lim and N.T. Koh, stating that Teng Pek and New Trading confirmed that the title deed was in their custody and undertook to return it to those directors within I fourteen days (P72). But it was never returned.

[5] There is in evidence (PBD6) what purports to be a resolution dated 22 June 1984, a day before the date of the letter of undertaking, at Yoon Hoe's EGM. Among other things, the resolution gave authority to the company to terminate the appointments of all the directors and of the secretary of the company with effect from 29 June 1988 and, with effect from that date, to elect Teng Pek and one Zulklifi bin Abdul Aziz as the new directors and to appoint one Chung Kah Ping as the secretary. There appear on the resolution what purport to be the signatures of K.C. Koh, N.T. Koh and Lim as persons attending the EGM. I proceed on the supposition that there was no such EGM or resolution. Mahadev Shankar J said that the signatures of K.C. Koh, N.T. Koh and Lim were a forgery.

[6] On 28 June 1984 KC Koh, NT Koh and Lim ("the three Yoon Hoe directors") entered a caveat against the land (Vol. 178 Folio 84). They must have done so in order to prevent any attempt by Chung or anyone else from disposing of the land fraudulently.

[7] From the evidence available, the first time that Chung got in touch with A&G was around 4 July 1984. On that date A&G wrote to K.C. Lee & Co., who Mahadev Shankar J said were the solicitors of the three Yoon Hoe directors. In that letter (P70) A&G said that they acted for Chung of New Trading who had instructed them to say that he acknowledged receipt of the title deed from the four directors and that this had been handed to Messrs Wong and Liew, advocates and solicitors, for onward transmission to a company called Scotch Leasing Sdn. Bhd., said to be the client of Wong and Liew. The letter added that, as far as Chung was aware, no charge had as yet been registered by Scotch Leasing over the property. There is no evidence of the background to this letter or as to whether at that stage Chung engaged A&G for any purpose beyond writing the letter. It is clear, however, that, by that letter, A&G were merely conveying to K.C. Lee & Co. a message for the three Yoon Hoe directors from Chung.

[8] As a follow-up on the false resolution of 22 June 1984, on 27 July 1984 there was brought into being the return form, Form 49 under s. 141(6) of the Companies Act 1965, signed by Teng Pek, which stated that with effect from 29 June 1984 all existing directors of Yoon Hoe, including the four directors, had resigned, that Teng Pek and Zulkifli had been appointed directors and that Chung Kah Ping had been appointed secretary (D61). This return was consequently also false.

[9] It was after that, probably in August 1984, that Chung first approached the first plaintiff company ("Ban Leung"), which had just been incorporated in 1984 as a credit company. The evidence as to this was given by Mr. Leong Chin Chye ("Leong"), who was the managing

director of Ban Leung at the time. In examination-in-chief Leong gave the following account of what happened. Chung came to the office of Ban Leung with a valuation report on the land and saw Leong. He held himself out as a Dato' and a Melaka State Assemblyman and as representing Yoon Hoe, but did not state his position in Yoon Hoe. He wanted a loan of about RM1 million on the security of the land. He told Leong that a very famous lawyer was acting for Yoon Hoe, mentioning A&G. Leong told him that Ban Leung were not able to give a loan because they had not yet been licensed to carry on moneylending business. Chung then went away leaving the valuation report, but came back about two weeks later with an offer to sell the land for RM990,000 on condition that Ban Leung, to quote Leong's words, "would give him an option to buy back the land after three months with a profit of RM100,000". Later, Chung and Leong went to see Ban Leung's solicitor, the first defendant ("Abraham") to talk about the sale of the land.

[10] It is a fact that on 5 September 1984 the directors of Ban Leung held their first board meeting (P44) and "in principle agreed and resolved" that Ban Leung should purchase the land for RM990,000 "subject to the terms and conditions of such agreements to be signed with the vendors" and that Leong and another director, Too A Ping @ Toh Ah Peng, "are hereby fully authorised to deal with the said Vendors and sign the relevant agreement for and on behalf of the company". The decision was stated to have been made after the directors had received "a general report" from Leong. The purchase was to be made with the second plaintiff company ("Kredit Waja") "on equal shares".

[11] According to Leong, Ban Leung and Kredit Waja, which was also formed in 1984, had some common directors and shareholders. From the evidence of Leong and Mr. Lau Ang Kam, a director of Kredit Waja ("Lau"), it would appear that Leong first approached Lau for Kredit Waja's participation in the deal only after the price of RM990,000 had been agreed and Ban Leung had appointed Abraham to act for them in the matter. Lau said in cross-examination that Leong approached him about two or three weeks before the sale and purchase agreement was signed. As it was signed on 23 November 1984, going by Lau's evidence it would have been about the beginning of November 1984 that Leong approached Lau. That cannot be right. When Ban Leung's directors resolved on 5 September 1984 that the land be purchased jointly with Kredit Waja, Leong would have already seen Lau about it and Kredit Waja would have already agreed to join Ban Leung in the purchase. Even if the decision to involve Kredit Waja was a tentative one made before Lau was approached, it is not probable that Leung took about two months after that decision to approach Lau.

[12] The title deed that was said to have been delivered to Scotch Leasing's solicitors, Messrs Wong and Liew, by Chung apparently did get into Scotch Leasing's possession. Apart from documentary evidence, there is no evidence of what actually happened on A&G's side in this matter, A&G's only witness, Mr. Khaw Chay Tee, who was a partner in A&G at the time, being a witness who gave evidence only from the records of A&G. There is, however, in evidence a letter dated 23 May 1985 written by A&G to Messrs Leng & Co., who were then solicitors acting for Yoon Hoe, to explain A&G's role and involvement in this affair (P24). In that letter A&G said that in early November 1984 Scotch Leasing, said to be A&G's clients, informed A&G that they were in possession of the title deed and that they would be handing it to A&G with instructions that it was to be returned to Yoon Hoe in exchange for RM200,000 said to be owing by Yoon Hoe to Scotch Leasing. This is consistent with the fact that on 13 November 1984 Scotch Leasing did write to A&G, in reference to a telephone conversation between Mr. David Lim of Scotch Leasing and Mr. Low Kim Soon of A&G, forwarding the title deed to A&G (D52). In that letter Scotch Leasing said that they had made arrangements with Mr. Lim Kim Chew who would be giving A&G a solicitor's undertaking to pay A&G RM200,000 immediately upon A&G delivering the title deed to Mr. Lim Kim Chew. Scotch Leasing asked A&G to secure the payment before delivering the title deed. A&G, however, did not deliver the title deed to Mr. Lim Kim Chew. The reason will appear shortly.

[13] On 17 November 1984, a few days after A&G received the title deed from Scotch Leasing, Teng Pek, the false director of Yoon Hoe, signed another Form 49 to report to the Registrar of Companies as regards Yoon Hoe that, with effect from 20 October 1984, Zulkifli bin Abdul Aziz had resigned as director, that Chung and one Mohamad Ilham bin Ismail had been appointed directors and that Chung had been appointed secretary in addition to Chung Kah Ping (D63). Also on 17 November 1984 Ilham signed a letter, as a director of Yoon Hoe, forwarding the Form 49 and another form, Form 48A, to the Registrar of Companies (D64). The Form 48A was a statutory declaration dated 19 November 1984 by Ilham (D62), being the statutory declaration that a person is required by s. 123(4) of the Companies Act 1965 to make and lodge with the Registrar of Companies before he is appointed a director of a company. It is probable that the forwarding letter (D64), although signed before the date of Ilham's statutory declaration, was sent after the statutory declaration was made, since the Registrar of Companies received the letter on 20 November 1984. The letter appears to bear Yoon Hoe's letterhead, but with an address in Melaka.

According to Lim, the genuine director, Yoon Hoe was a company in Baru Pahat and did not have a letterhead with a Melaka address. Chung and associates' wiles to appear in the registrar's records as officials of Yoon Hoe were so successful that at least until 1998 Chung and Ilham remained on record as directors of Yoon Hoe and Chung as secretary (D74).

[14] Also on 17 November 1984 there was seemingly an "Extra Ordinary Meeting" of Yoon Hoe which resolved that the land be sold for RM990,000, that Chung be authorized to sign the sale and purchase agreement and all other pertinent documents and that the signatures of Ilham and Chung "are required when the company's common seal is affixed". There is in evidence what purports to be an extract dated 20 November 1984 pertaining to that resolution from the minutes of that meeting. It bears what purport to be the signatures of Ilham as Chairman and of the aforementioned Chung Kah Ping. It is on the Yoon Hoe letterhead with the Melaka address (D26).

[15] Chung and Ilham were now armed with false documentary proof of their directorship of Yoon Hoe and of Yoon Hoe's authorization to sell the land. With this proof Chung approached A&G, who had received the title deed on 13 November 1984 from Scotch Leasing for delivery to Yoon Hoe, and convinced A&G that he was a director of Yoon Hoe having authority to act in the transaction involving the land. This was what A&G stated in their explanatory letter to Leng & Co. that has been mentioned (P24). A&G said that the documents which Chung furnished to them, copies of which they enclosed for Leng & Co's perusal, "seem to indicate that [Chung] in fact had authority to act on behalf of [Yoon Hoe]". A&G said that Chung informed them that Yoon Hoe had "entered into a sale" of the land to Ban Leung and Kredit Waja and that Abraham was acting for those companies, and Chung requested them to prepare the memorandum of transfer, as Yoon Hoe was eager to finalize the sale, and to release the memorandum of transfer and the title deed to Abraham upon receipt from him of the sum of RM838,000. That was the reason why A&G did not forward the title deed to Lim Kim Chew. It is important to note that to the understanding of A&G, as may be inferred from their letter to Leng & Co, the sale had already been concluded and that all that was left to be done was the preparation of the memorandum of transfer to pass the title to the purchasers, which A&G were requested to prepare. It is also important to note that, apart from what Chung was said to have informed them, there is no evidence that A&G knew anything about the state of the sale transaction or of the sale and purchase agreement.

[16] It is a fact that on 19 November 1984 Chung signed a letter purportedly on behalf of Yoon Hoe on the Yoon Hoe letterhead with the Melaka address, addressed to Mr. Low Kim Soon of A&G, confirming that Yoon Hoe's board of directors had appointed A&G to represent Yoon Hoe to make all documents for the sale (supaya membuat segala dokumen-dokumen kerana jualan tersebut) (D53). The letter spoke of making all documents for the sale, but I think that was just a generalization at the letter stage. It is probable that Chung had seen A&G before that letter and had requested A&G, as they said, only to prepare the memorandum of transfer. It could not have been otherwise because, on the evidence, that was the only document that A&G prepared.

[17] It is a fact established by the evidence of Mr. Khaw, A&G's sole witness, that there are, in A&G's file, copies of the following documents mentioned earlier, namely, Form 49 dated 27 July 1984 (D61), Form 49 dated 17 November 1984 (D63), the letter dated 17 November 1984 (D64), Form 48A dated 19 November 1984 (D62), the extract of resolution dated 20 November 1984 (D26) and also a copy (D65) of proof of receipt by the Registrar of Companies of D63 and D62. These must have been among the documents furnished by Chung to A&G to convince them that Chung was a director of Yoon Hoe and had authority to sell the land.

[18] It would have been pursuant to Chung's instructions, and in the belief that Chung was acting on Yoon Hoe's authority and with the knowledge, imparted by Chung, that Abraham was acting for the purchasers, that on 20 November 1984 A&G wrote to Abraham saying that they were acting for Yoon Hoe and that they had been given to understand that Abraham was the solicitor acting for the purchasers in respect of the sale and purchase of the land. By the letter (P1), A&G confirmed that they had in their possession the title deed and the memorandum of transfer together with the stamping proforma duly executed "by our clients", which they would release to Abraham for further action upon receipt of the full purchase price of RM990,000. With the letter, A&G enclosed a copy of the Memorandum and Articles of Association of Yoon Hoe and a copy of the extract of the false resolution of 17 November 1984 (D26). A&G also said that "our clients" were making arrangements to withdraw the two private caveats presently lodged against the land. One of the caveats was the caveat of the three Yoon Hoe directors entered on 28 June 1984. According to Mahadev Shanker J, the other caveat was one entered on 24 December 1981 (Jilid 114 Folio 36) by a company called Uni-Harta Sdn. Bhd. with whom Yoon Hoe had entered into a joint-venture agreement after Yoon Hoe acquired the land in 1980.

[19] Although A&G said in the letter that they were acting for Yoon Hoe, they were not acting for Yoon Hoe. They only believed that they were acting for Yoon Hoe. Although the letter was copied to Yoon Hoe, it was to the false Melaka address.

[20] Abraham responded on 22 November 1984 by requesting for photocopies of the title deed and memorandum of transfer. A&G furnished these on the same day.

[21] On 22 November 1984 Messrs Louis K.H. Wong & Co, the name under which the third defendant practised as an advocate and solicitor, wrote to Abraham, with copy to A&G, stating that they were acting for "Syarikat Yoon Hoe Pembangunan Sdn. Bhd. of Suite 101, Kwang Tung Association Building, Jalan Pudu, Kuala Lumpur", which was not Yoon Hoe's address, and that they had been instructed by their clients to confirm that the withdrawals of the two caveats had been presented on 21 November 1984 for registration (P14). As far as the caveat of the three Yoon Hoe directors of 28 June 1984 is concerned, the registration of the withdrawal application was on 21 November 1984 (Vol. 190 Fol. 95), as was noted on the withdrawal application dated 16 November 1984 (P33). That date was the day before the date of the Form 49 (D63) and the false Yoon Hoe resolution in D26 that have been mentioned. The application purported to be signed by the three Yoon Hoe directors in front of one Wong Sheng Chan, an advocate and solicitor. Leng & Co., Yoon Hoe's solicitors who have been mentioned, were later to claim in a letter to Abraham dated 16 March 1985 (P19) that the caveat had been unlawfully and fraudulently removed. Mahadev Shanker J said that the two caveats were withdrawn by a trick and that Wong Sheng Chen had not been traced. The three Yoon Hoe directors having entered their caveat to prevent dealings with the land after Chung had dishonestly obtained the title deed, could not have withdrawn it. The withdrawal of the caveat must have been fraudulent and the signatures of the three directors must have been a forgery.

[22] On 23 November 1984, the day after Messrs Louis K.H. Wong & Co's letter to Abraham about the withdrawal of the two caveats, the sale and purchase agreement (P4) was signed between Ban Leung and Kredit Waja as purchasers and purportedly by Yoon Hoe as vendor. Chung signed the agreement as on behalf of Yoon Hoe. It was prepared by Abraham, who witnessed the signing by all parties. There is no evidence that A&G knew of the signing, or of the contents, of the agreement. In clause 1 the vendor acknowledged receipt of the sale price of RM990,000, but actually it had not yet been paid. According to cl. 2 the vendor was to deposit with Abraham the duly executed memorandum of transfer upon the execution of the agreement for purposes of adjudication "until three months from the date hereof, but

the memorandum of transfer was not deposited with Abraham until later. By cl. 3 Abraham was to release "the balance sum" to the vendor within ten days of the presentation of the transfer for registration provided that the land was not encumbered, but, as will be related, RM838,000 was released before the presentation of the transfer.

[23] On 26 November 1984 Ban Leung paid to Abraham their half share of the purchase price, RM495,000 (P45). Kredit Waja paid Abraham their share after that but, according to Leong of Ban Leung, not in full. Leong said that he thought Kredit Waja paid RM383,000.

[24] On 27 November 1984 Chung signed two letters on the Yoon Hoe letterhead with the Melaka address purportedly on behalf of Yoon Hoe. One letter (D56) was to A&G to confirm that upon receipt of the "total consideration" of RM838,000 from Abraham, A&G were to release the title deed and the duly executed memorandum of transfer and the stamping proforma to Abraham. A&G were informed that the sum of RM838,000 was to be released to three parties: RM306,237.33 to Michael Chen & Lee, RM202,580 to A&G, and RM329,182.67 to Chung. The other letter (D57) was to Abraham requesting Abraham to "deduct from our account and make the following payments", that is the three payments as stated in the letter to A&G. On the same date A&G wrote to Abraham (P5), to confirm that upon receipt of the said three payments they would forward to Abraham the title deed, the duly executed memorandum of transfer and the stamping proforma.

[25] It is to be observed that although the purchase price stated in the agreement was RM990,000, Chung in his letter to A&G regarded RM838,000 as the "total consideration", meaning that that was the entire sum that Ban Leung and Kredit Waja were expected to pay. Leong of Ban Leung explained that, with Kredit Waja's payment of RM383,000 and Ban Leung's payment of RM495,000 to Abraham, the total paid to Abraham was RM878,000, which was more than the sum of RM838,000 that Abraham was to pay out by RM40,000, which Leong said was for transfer fees, processing fees and other fees. As to the balance of RM152,000 between the purchase price and the sum of RM838,000, Leong said that had the transaction gone through it would have been paid after the transfer was registered. But if, as Chung said in his letter, the sum of RM838,000 was the "total consideration", there would have been no difference or balance to be further paid.

[26] On 28 November 1984 the Registrar of Titles gave notice (PI7) to Yoon Hoe, addressed to their office in Batu Pahat, with a copy to Abraham, of the entry on that day of a caveat (vol. 191 Fol. 77) against the land by Ban Leung and Kredit Waja.

[27] On 29 November 1984 A&G received from Abraham three cashier's orders in the required sums in favour of the three parties and delivered to Abraham the title deed, the memorandum of transfer "duly executed by our clients" and the stamping proforma (D6 and P9). On the same day Chung issued a receipt acknowledging receipt from A&G of the cashier's order for RM329,182.67 in his favour, said to be "balance purchase price in respect of the sale" of the land (D59). On the same day A&G, as acting for Yoon Hoe, wrote a letter to Michael Chen & Lee (D58). The heading of the letter, which was for the attention of Mr. Lee Kuan Mang, referred to the sale and purchase of Lots 734, 385 and 660 Seremban Town. A&G said that they had been instructed "by our client" to forward the cashier's order for RM306,237.33, which was one of the cashier's orders that they had received from Abraham, "being part payment towards the purchase" of the three lots. The matter of the purchase of the three lots will be explained shortly. The instructions stated in the letter must have been Chung's instructions. As regards the cashier's order for RM202,580 in favour of A&G, on 30 November 1984 A&G wrote a letter to Scotch Leasing (D60), in response to Scotch Leasing's letter dated 13 November 1984 mentioned before (D52), in which they said that the sum of RM200,000 payable to Scotch Leasing for the release of the title deed had been received. A&G said that Scotch Leasing had authorized a deduction of RM23,896 in respect of A&G's Bill No. 1213 of 1984. They therefore forwarded to Scotch Leasing a cheque for RM178,580. I observe that the sum was not the correct result of subtracting RM23,896 from RM200,000. The correct result would have been RM176,104. Even if the subtracting was from the sum of RM202,580 that was actually received, the result would have been RM178,684. A&G also said that the sum was forwarded on Scotch Leasing's undertaking to give to A&G the escrow transfer duly executed by the "borrowers", presumably Yoon Hoe, the original power of attorney with the deed of revocation, and the withdrawal of the caveats against Lots 607 and 608 Mukim of Hulu Kelang. There is no evidence of the context for those three documents and the caveats. A supposed loan of RM200,000 by Scotch Leasing to Yoon Hoe has been mentioned previously. It looks as if Chung had given the title deed to Scotch Leasing as security for a loan of RM200,000 and that those documents were no longer necessary now that the loan was being repaid.

[28] There is in evidence a sale and purchase agreement dated 24 December 1984 in respect of the aforementioned Lots 734, 385 and 660 Seremban Town between three Chinese ladies as vendors and Yoon Hoe as the purported purchaser, on whose behalf Chung purportedly signed the agreement (D73). It acknowledged the payment of a deposit of RM306,237.33 by the purchaser. Michael Chen & Lee were

mentioned in the agreement as the solicitors to whom the balance of the purchase price was to be paid. All parties signed before Lee Kuan Mang, who, according to Mr. Khaw, A&G's witness, was a solicitor of Michael Chen & Lee. RM306,237.33 was the amount of the cashier's order from Abraham that A&G had forwarded to Michael Chen & Lee on 29 November 1984. To the extent at least that Chung was not an authorized representative of Yoon Hoe and that therefore Yoon Hoe was not the purchaser, the sale and purchase agreement was a fraud.

[29] As stated before, A&G had on 22 November 1984 forwarded to Abraham a photocopy of the memorandum of transfer purportedly executed by Yoon Hoe, and the original was forwarded on 29 November 1984. The copy of the memorandum of transfer that is in evidence (P10) shows that what purported to be the common seal of Yoon Hoe was affixed before Ilham and Chung, who signed as witnesses to the affixing. [A&G were subsequently, in a letter to Abraham dated 19 September 1985 (D55), to confirm that the seal was affixed by Chung in the presence of their Mr. Francis Leong and Mr. Low Kim Soon]. The date of the affixing is given as 30 January 1985, which is also the date given as the date of execution by Ban Leung and Kredit Waja. The actual execution on the vendor's side would have been on or before 20 November 1984, the date when A&G informed Abraham that they had in their possession the memorandum of transfer, and one would think that the date of execution was left blank to be filled in when the purchasers executed the memorandum of transfer so that the date of execution by all parties would be made to appear to be the same date, 30 January 1985. But according to Mahadev Shankar J the photocopy of the memorandum of transfer sent by A&G to Abraham on 22 November 1984 showed that the purported transfer on behalf of Yoon Hoe was executed on 30 January 1985.

[30] On 4 February 1985 a private caveat (Vol. 196 Fol. 94) was entered against the land by the three Yoon Hoe directors (P30). On 20 April 1985 a private caveat (vol. 202 Fol. 44) was entered against the land on behalf of Yoon Hoe by Mr. Leng Boon Tai of Leng & Co., Yoon Hoe's solicitors (P31). Those were two of the three caveats that Ban Leung and Kredit Waja failed to have removed and that prevented the registration of the transfer of the land to them. The other caveat was by one Yap Cheng Kin (vol. 202 Fol. 99), entered on 30 April 1985. According to Mahadev Shanker J, Yap claimed that she had lent Chung RM457,000 and that for some reason which I need not state she had an interest in the land.

[31] On 31 March 1987 Ban Leung and Kredit Waja filed the present action claiming general damages and special damages. The special damages claimed comprise RM 838,000 that they had paid, RM28,260 stamp duty and RM18,500 solicitor's fees, disbursements and expenses.

[32] On 26 October 1995 Yoon Hoe entered into an agreement for the sale of the land to a company by the name of Atlas Housing Sdn. Bhd. for RM3,367,564 (P36). On 24 June 1996, after the trial of this action had started, Kredit Waja issued to Atlas a letter acknowledging receipt of RM350,000 for releasing the title deed, which had been in Kredit Waja's possession, to Atlas. Accordingly the special damages claimed in this action have been reduced by that amount.

[33] As I construe the reamended statement of claim, the plaintiffs found their action against A&G on the allegation in para. 9 that A&G "advised or induced" the plaintiffs to enter into the sale and purchase agreement of 23 April 1984 by making certain representations to the plaintiffs which are listed in that paragraph. Paragraph 11 claims that the representations were contained in or are to be inferred from three letters. Guided by para. 36 of the plaintiffs' written submission dated 28 June 2002, I identify the three letters as A&G's letter to Abraham dated 20 November 1984 (PI) by which A&G said that they would release the title deed and the memorandum of transfer upon receipt of the purchase price of RM990,000, A&G's letter to Abraham dated 22 November 1984 by which they enclosed photocopies of those documents (P3), and A&G's letter to Abraham dated 27 November 1984 by which they said that they would forward those documents upon receipt of payments to the three parties totalling RM838,000 (P5). Paragraph 15 alleges that A&G, in breach of their duty - which para. 10 claims to be "a duty to exercise all due care skill and diligence as solicitors to protect the interest of the plaintiffs" in the sale transaction - were negligent in making those representations and sets out the particulars of negligence. Paragraph 16 is an alternative ground which appears to stand on its own but still relies on "the said representations". They are said to be false representations that had "wrongly induced" the plaintiffs to enter into the sale and purchase agreement. It can be seen therefore that the case of the plaintiffs against A&G hangs on the overriding allegation that A&G had, by making representations contained in or to be inferred from those three letters, advised or induced the plaintiffs to enter into the sale and purchase agreement. It seems to me that the question of making representations that advised or induced the plaintiffs to enter into the sale and purchase agreement needs to be considered in relation only to the first of the three letters because the other two were merely developments from the

first letter and did not contain anything more than the first letter that could be said to advise or induce the plaintiffs to enter into the sale and purchase agreement. In any case the third letter has definitely to be excluded because it was dated 27 November 1984, after the sale and purchase agreement was signed on 23 November 1984. So the foremost question to be answered in this case is whether the first letter advised or induced the plaintiffs to enter into the sale and purchase agreement. As far as advising is concerned, I do not consider that there is anything in the letter or anything that can be inferred from the letter that can be said to be an advice to the plaintiffs to enter into the sale and purchase agreement. It was written in the belief or on the assumption that the sale and purchase had been concluded and was only looking to the conveyancing aspect of the transaction.

[34] When the plaintiffs filed their action, they would already have known, from communications to Abraham by Yoon Hoe's solicitors, Leng & Co., that the purported sale of the land was a fraud because it was not a sale by Yoon Hoe, the legal owner of the land. From the particulars of alleged representations in paras. 9 and 16 of the reamended statement of claim, the burden of the plaintiffs' case appears to be that it was by the representations of A&G that the plaintiffs believed that the sale was a genuine and proper sale. For the plaintiffs to succeed in their claim that it was A&G's representations that induced them to enter into the sale and purchase agreement, there must be evidence that, in spite of having the services of Abraham, they would not have entered into the sale and purchase agreement had they not derived assurance from A&G's letter that the sale was in fact by Yoon Hoe and there must also, and more importantly, be evidence of the fact that, and the reason why, they were in doubt that the sale was by Yoon Hoe. But there has been no such evidence. There is no evidence that the plaintiffs ever doubted that the sale was by Yoon Hoe. On the contrary, the evidence shows that the plaintiffs never doubted that they were buying from Yoon Hoe. According to Leong of Ban Leung, when Chung approached him two weeks after Chung's first approach in August 1984, Chung told him that a very famous lawyer, naming A&G, was acting for Yoon Hoe (notes p. 48 E-F). And soon after that, on 5 September 1984, Ban Leung resolved to buy the land jointly with Kredit Waja. It was a resolution in principle, no doubt, but there is no evidence that it was made in principle because of doubt that it was Yoon Hoe that was selling the land. It was suggested to Leong in cross-examination that Ban Leung would have entered into the sale and purchase agreement all the same irrespective of which solicitors represented the vendor. His reply was (notes p. 72 D): "The condition then was that we wanted

A the vendor to choose a famous lawyer because the land involved a lot of money", but not because they were uncertain that it was Yoon Hoe that was selling.

[35] The evidence of Lau of Kredit Waja on this aspect of the case, which I gather both from his examination-in-chief and cross-examination (notes p. 13 C and 18 C-D), is that it was immediately before signing the agreement on 23 November 1984 that he was shown by Abraham A&G's letters, which could have been only the letters dated 20 November 1984 and 22 November 1984, from which he understood that A&G were acting for Yoon Hoe, and that made him feel comfortable. But he did not say why otherwise he would not have felt comfortable. I am inclined to treat this aspect of the evidence as contrived and unnatural. I would be sympathetic with the plaintiffs were the evidence to be this. The plaintiffs doubted whether it was genuinely a sale by Yoon Hoe and had told Abraham that they would not sign the sale and purchase agreement until he was satisfied that it was truly a sale by Yoon Hoe. Then on 23 November 1984 Abraham told them it was alright to sign the agreement and to come over and sign the agreement because there were letters from A&G by reason of which it could not be doubted that the sale was truly by Yoon Hoe. They then went to Abraham, saw the letters and signed the agreement. But such is not the evidence.

[36] On the evidence, therefore, I find on a balance of probabilities that the plaintiffs had decided to enter into the sale and purchase agreement even before 20 November 1984, the date of the first of A&G's three letters, and would have entered into the sale and purchase agreement in any event and that, therefore, that letter, and any representations that may be contained in it or inferred from it, did not induce the plaintiffs to enter into the sale and purchase agreement. I feel able to dismiss the plaintiffs' claim against A&G on that ground without having to examine the other aspects of the claim, such as the alleged representations in detail, the question of the duty of A&G to the plaintiffs, and the question of whether A&G were negligent in making the representations.

[37] It seems to me, although this was not raised by Yoon Hoe, that the plaintiffs' case against Yoon Hoe is fouled by their own reamended statement of claim. Let me go over the relevant paragraphs. I have mentioned para. 9 in relation to A&G. It is also directed against Abraham and Louis K.H. Wong, but not against Yoon Hoe. It alleges that those defendants advised or induced the plaintiffs to enter into the sale and purchase agreement by certain representations. Paragraph 10 avers a duty on the part of those defendants to exercise due care, skill and diligence as solicitors. Paragraph 11 alleges the source of the

representations as certain letters from A&G and Louis K.H. Wong to Abraham. Yoon Hoe is not included. Yoon Hoe appears for the first time in para. 15 where it is grouped together with the other defendants to bear the allegation that "In breach of their respective duties [they] have been negligent in making the said representations". The first thing to note is that whereas a duty as solicitors has previously been alleged against the other defendants, no duty has previously been alleged against Yoon Hoe. But the second thing to note is what is more important, and that is, that the allegation against Yoon Hoe is negligence in making "the said representations", which must refer to the representations by the letters mentioned in para. 11. But those letters were not Yoon Hoe's letters and the representations were not Yoon Hoe's representations. So there is no basis for the claim that Yoon Hoe was negligent in making representations and the claim must fail. It is only in the particulars of negligence in para. 15 that it is seen that the case against Yoon Hoe is that of negligence in allowing the title deed and the company seal to fall into others' hands. In para. 2 of the plaintiffs' written submission in respect of Yoon Hoe the claim of negligence is narrowed down to apply only to the title deed. But the claim of negligence in failing to take good care of the title deed cannot survive under para. 15 because the case under para. 15 is that of negligence by the making of representations by the letters specified in para. 11.

[38] In any event, putting aside the question of defect in the plaintiffs' reamended statement of claim and taking the claim against Yoon Hoe to be one of negligence in parting with the title deed to Chung, in my judgment Yoon Hoe did not owe a duty of care to the plaintiffs not to part with the title deed to Chung. The plaintiffs argue that Yoon Hoe owed a duty of care to them because it was reasonably foreseeable that Chung would use the title deed for some unauthorized purpose that could result in an innocent purchaser of the land suffering loss and damage. This is what the plaintiffs say in para. 15 of their written submission in respect of Yoon Hoe:

> It is the Plaintiffs' submission that there is a duty of care owed by [Yoon Hoe] to the Plaintiffs. The Plaintiffs submit that it is reasonably foreseeable that Chung could use the Original Issue Document of Title for some unauthorized purpose. By reason of the aforesaid an innocent purchaser could suffer loss and damage. Therefore it is the Plaintiffs' submission that there is a duty of care owed by [Yoon Hoe] to the Plaintiffs.

In my judgment the use to which the title deed was put after Chung obtained possession of it to further Chung's fraudulent design, as has been narrated, cannot be said to be reasonably foreseeable when the Yoon Hoe directors let Chung have possession of it on 17 April 1984.

A The Yoon Hoe directors must have believed that Chung's company wanted to buy Yoon Hoe shares and needed to see the title deed to Yoon Hoe's only property before deciding to buy. They could not reasonably have foreseen that Chung would retain the title deed to carry out his fraudulent scheme and I am not inclined to hold that they ought
B reasonably to have foreseen it. They may have been foolish and careless in leaving the title deed with Chung instead of merely showing it or leaving a photocopy of it, as the plaintiffs submit they should have done, but that makes no difference to the question of the reasonable foreseeability of the subsequent use of the title deed. Since, in my
C judgment, Yoon Hoe did not owe a duty of care to the plaintiffs when its directors let Chung have possession of the title deed, the plaintiffs' claim in negligence against Yoon Hoe must fail.

[39] I dismiss the plaintiffs' claim against A&G (second defendant) and Yoon Hoe (fourth defendant) with costs and order that the sum of
D RM10,000 paid by the plaintiffs into court on 20 September 1996 as security for costs be released to A&G as part of their taxed costs.

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